



U.S. Department of Justice

United States Attorney
Eastern District of New York

JAM:AL:LDM:CSK

271 Cadman Plaza East
Brooklyn, New York 11201

April 9, 2021

By ECF

Honorable Alison J. Nathan
United States District Court
Southern District of New York
40 Foley Square
New York, NY 10007

Re: *Koestler v. Shkreli*, 16-CV-7175 (S.D.N.Y.) (AJN)

Dear Judge Nathan:

The undersigned Assistant U.S. Attorneys represent the government in connection with the forfeiture aspects of the criminal case against respondent Martin Shkreli (“Shkreli”) in the Eastern District of New York, *United States v. Shkreli*, 15-CR-637 (E.D.N.Y.) (Matsumoto, J.) (the “Criminal Case”). This letter is respectfully submitted in response to this Court’s order, dated March 5, 2021, permitting the United States Attorney’s Office for the Eastern District of New York to respond to the application (the “Application”) filed by petitioner Thomas P. Koestler (“Petitioner”) seeking an order to show cause, turnover order, and appointment of receiver. As set forth herein, the government does not oppose the Application, provided that, in the event it is granted and this Court orders a receivership, the forfeiture judgment entered against Shkreli is first fully satisfied from any liquidation of Shkreli’s interest in Phoenixus AG.

I. Relevant Background to the Forfeiture Proceedings in the Criminal Case

On August 4, 2017, Shkreli was convicted at trial in the Eastern District of New York of conspiracy to commit securities fraud and securities fraud. On March 5, 2018, the Court in the Criminal Case entered a Preliminary Order of Forfeiture (the “Forfeiture Order”) requiring Shkreli to forfeit \$7,360,450.00 and entered a judgment (the “Forfeiture Money Judgment”) in that amount. The Forfeiture Order further required the defendant to forfeit, pursuant to 21 U.S.C. § 853(p), his interest in various assets (the “Substitute Assets”), up to the amount of the Forfeiture Money Judgment. Among the Substitute Assets named in the

Forfeiture Order is Shkreli's interest in Phoenixus AG, a closely held company located in Switzerland.¹

To date, the government has collected \$5,121,967.70 towards the Forfeiture Money Judgment, leaving an outstanding balance currently in the amount of \$2,238,482.30 (the "Outstanding Balance"). The amount collected to date does not include Shkreli's interest in Phoenixus AG, which remains available to satisfy the Outstanding Balance and which Petitioner now seeks to have turned over in the Application.

II. The Government's Response to the Application

In the Application, Petitioner, pursuant to Fed. R. Civ. P. 69(a) and CPLR § 5228, seeks the turnover of, and appointment of a receiver to liquidate, Shkreli's interest in Phoenixus AG to collect a judgment in the amount of \$2,614,930.00.

Pursuant to the Forfeiture Order, Shkreli's interest in Phoenixus AG is subject to forfeiture, and the certificate for his preferred shares is in the government's custody.² While 21 U.S.C. § 853(k) bars the intervention of a third party asserting an interest in property subject to forfeiture, here the government has no objection to the Application provided that, in the event it is granted and a professional receiver is appointed, any proceeds from the liquidation of Shkreli's interest in Phoenixus AG are first applied towards the Outstanding Balance of the Forfeiture Money Judgment. The undersigned have discussed the government's position with Richard J.J. Scarola, counsel for Petitioner, who has advised that he has no objection to the payment of the Outstanding Balance first, before any proceeds are applied towards Petitioner's judgment.³

Accordingly, in the event that this Court grants Petitioner's request for a receiver and orders that Outstanding Balance of the Forfeiture Money Judgment to be paid first, the government would apply to the Court in the Criminal Case to release Shkreli's interest in Phoenixus AG, or any portion thereof as required. Finally, the government takes no position

¹ As no third-party claims to Shkreli's interest in Phoenixus AG were filed in an ancillary proceeding, as required pursuant to 21 U.S.C. § 853(n), the Forfeiture Order became final as to this asset in a Final Order of Forfeiture entered on September 10, 2018.

² Phoenixus AG was previously named Turing Pharmaceuticals AG and then Vyera Pharmaceuticals AG. In response to the Forfeiture Order, which refers to Vyera Pharmaceuticals, respondent Shkreli turned over to the government a certificate for preference shares A in Turing Pharmaceuticals.

³ The government is also in discussions, and hopes to resolve, with Mr. Scarola issues relating to a non-party Information Subpoena directed to the government, a copy of which is attached as Exhibit J to the Declaration of Richard J.J. Scarola in Support of Application for Turnover and Appointment of a Receiver. (Dkt. No. 48-10).

